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No. 859

In the Supreme Court of the United States

OCTOBER TERM, 1935

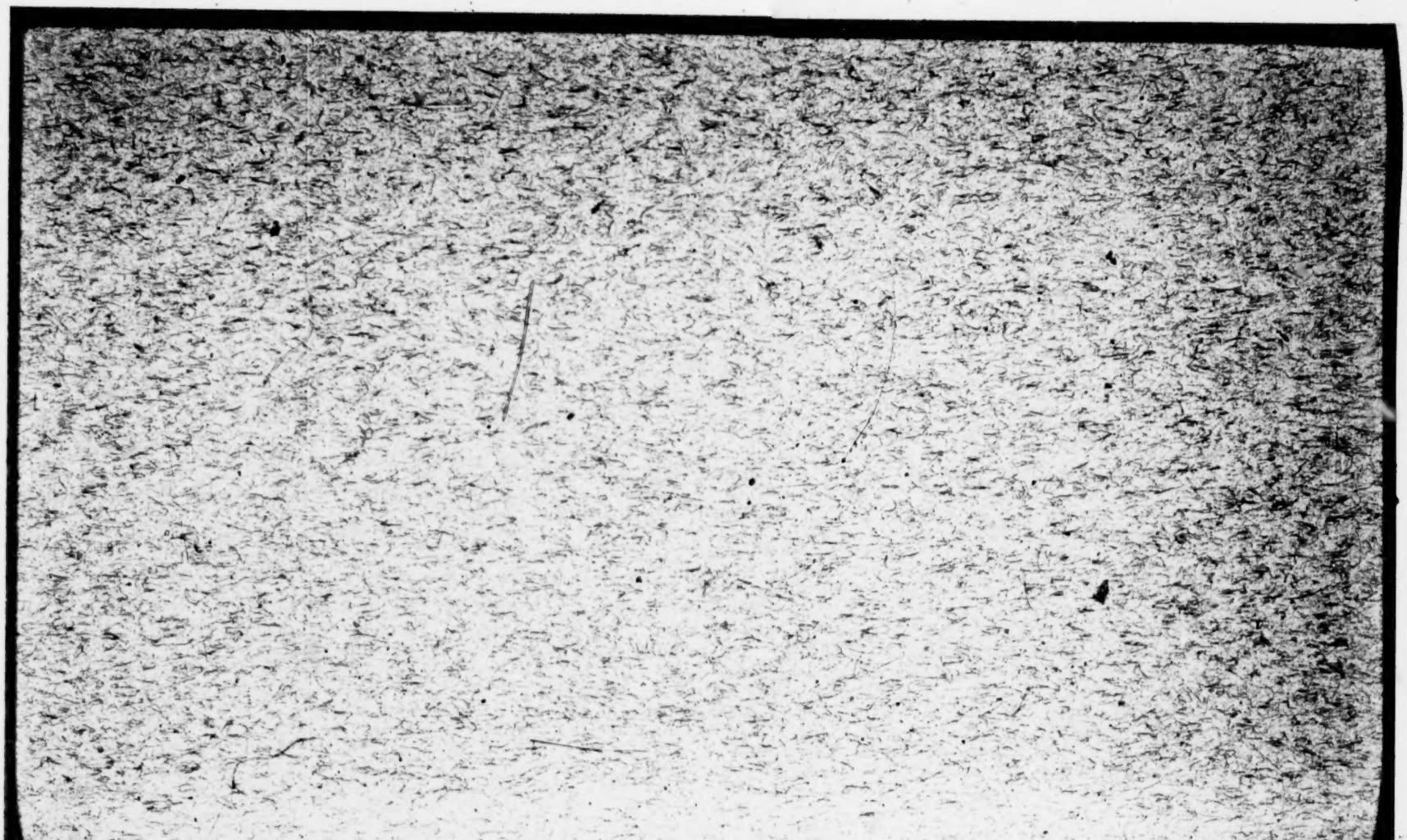
C. L. ASHTON ET AL., PETITIONERS,

v.

CAMERON COUNTY WATER IMPROVEMENT DISTRICT NO. ONE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE.



INDEX.

SUBJECT INDEX.

	Page
Statement	1
Summary of argument	2
Argument:	
I. The case should be remanded without decision of the constitutional questions raised, both because of jurisdictional defects and because this is not an appropriate case for determining those important questions	3
A. The Circuit Court of Appeals apparently had no jurisdiction to enter the judgment below because the appeal from the District Court was improperly taken	3
B. Several important facts necessary for a proper determination of the constitutional questions raised by the petitioners are not contained in the record.	5
C. The threatened loss to the petitioners is too hypothetical and speculative to raise a substantial Federal question	8
II. The validity of the loan authorization by the R. F. C. to Cameron County Water Improvement District No. 1 and the statute authorizing the loan should not be determined in this case	9
A. Petitioners are not injured by the loan authorization by the R. F. C. or by the statute authorizing the loan	10
B. The questions raised by petitioners, with respect to the Reconstruction Finance Corporation do not relate to the jurisdiction of the District Court	11
C. In any event petitioners' alleged injury is at this time too remote and speculative to permit petitioners to press their constitutional objections	13
D. No adequate record for the determination of such questions is presented	14
III. The statute authorizing the loan proposed to be made by Reconstruction Finance Corporation is a traditional and proper exercise by Congress of Federal powers	15
A. Fiscal powers	16
B. General welfare	31
C. State rights have not been invaded	35
Conclusion	38
Appendix	39

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CITATIONS.

Cases:	Page
Abrams et al. v. Van Schaick, 293 U. S. 189	9, 14
Alabama v. Arizona, 291 U. S. 286	13
Ashwander v. Tennessee Valley Authority, Nos. 403-404, October Term, 1935	28, 35
Baltimore National Bank v. Maryland State Taxing Commission, No. 283, October Term, 1935	19, 27
Borden's Farm Products Co., Inc., v. Baldwin, 293 U. S. 194	7
Boston & Maine R. Co. v. Armbrug, 285 U. S. 234	13
Camfield v. U. S., 167 U. S. 518	28
City of Asbury v. Christmas, 78 Fed. 1003	25
Clemons v. Liberty Corp. (C. C. A. 5th), 61 Fed. (2d) 448	4
Concordia Insurance Co. v. Illinois, 292 U. S. 535	10
Daniel v. Guaranty Trust Co., 295 U. S. 154	5
Deeley v. Cincinnati Publishing Co. (C. C. A. 6th), 23 Fed. (2d) 920	4
Delaware & Hudson Co. v. United States, 266 U. S. 438	14
Fallbrook Irrigation District v. Bradley, 164 U. S. 112	34
Farmers' National Bank v. Dearing, 91 U. S. 29	17
Federal Compress Co. v. McLean, 291 U. S. 17	36
Federal Land Bank v. Gaines, 290 U. S. 247	22
Federal Land Bank v. Priddy, 295 U. S. 229	22
In re Federal Photo Engraving Corporation (C. C. A. 2d), 54 Fed. (2d) 628	4
First National Bank v. Union Trust Company, 244 U. S. 416	17, 25
Great Southern Fire Proof Hotel Company v. Jones, 177 U. S. 449	5
Gulbransen Co. v. Couch (C. C. A. 5th), 61 Fed. (2d) 933	4
Heald v. District of Columbia, 259 U. S. 114	10
Hendrick v. State of Maryland, 235 U. S. 610	7, 10
Hopkins' Federal Savings & Loan Association v. Cleary, Nos. 55-57, October Term, 1935	33, 37
Humphrey v. Bankers Mortgage Co. (C. C. A. 10th), 79 Fed. (2d) 345	4
Interstate Busses Corporation v. Holyoke Street Railway Company, 273 U. S. 45	12
Kansas v. Colorado, 206 U. S. 46	28, 32
Liverpool, New York and Philadelphia Steamship Co. v. Commissioners of Emigration, 113 U. S. 33	7, 13
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555	5
Mason v. Hardy (C. C. A. 10th), 45 Fed. (2d) 587	4
Massachusetts v. Mellon, 262 U. S. 447	36
McCulloch v. Maryland, 4 Wheat. 316	16, 17, 27
Meyer v. Kenmore Hotel Co., Nos. 375-376, October Term, 1935	4
New Jersey v. Sargent, 269 U. S. 328	10, 13
Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240	16
Osborn v. Bank, 9 Wheat. 738	16
Pan American Co. v. U. S., 273 U. S. 456	28
Railroad Co. v. Ellerman, 105 U. S. 166	10
Ruddy v. Rossi, 248 U. S. 104	28

Page

Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, 293 U. S. 449 5
Smith v. Kansas City Title Company, 255 U. S. 180 ..... 18, 22, 23, 26
Stratton v. St. Louis South Western Railway Company, 282 U. S. 10 5
Texas v. Interstate Commerce Commission, 258 U. S. 158 ..... 12, 15
United States v. Beebe, 127 U. S. 338 28
United States v. Butler, No. 401, October Term, 1935 ..... 31, 32, 33, 34, 35
United States v. California, No. 33, October Term, 1935 ..... 27, 28
United States v. Gratiot, 14 Pet. 526, Fed. Cas. No. 15, 249 ..... 27, 29
United States v. Guaranty Trust Co., 280 U. S. 483 25
United States v. Hanson, 167 Fed. 881 (C. C. A. 8th) 28, 32
United States v. Illinois Central R. Co., 291 U. S. 457 14
United States v. Los Angeles & Salt Lake R. Co., 273 U. S. 299 14
United States v. Munday, 222 U. S. 175 28
United States v. Shryock, 162 Fed. 790 28
United States v. Trinidad Coal Company, 137 U. S. 160 28
Valley v. Northern Fire Insurance Co., 254 U. S. 348 4
Vitagraph v. St. Louis Prop. Corp. (C. C. A. 8th), 77th Fed. (2d) 590 4
Westfall v. United States, 274 U. S. 256 17
Wilkerson v. Cooch (C. C. A. 4th), 70 Fed. (2d) 351 4
Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U. S. 217 14

Statutes:

Bankruptcy Act
Sec. 24(b) 3
Sec. 80 ..... 1, 2, 5, 10, 11
Sec. 80(c) 11
Sec. 80(e) 9, 11, 14
Emergency Farm Mortgage Act of 1933 ..... 19, 22, 40
Federal Farm Loan Act, Sec. 6, Sec. 13; c. 245, Sec. 22, 39 Stat. 378; c. 252; Title III, §309, 42 Stat. 1477 22
Federal Farm Loan System, 39 Stat. 360, c. 245 17
Federal Reserve System, 38 Stat. 251, c. 6 17
Reconstruction Finance Corporation Act, 47 Stat. 5 U. S. C., c. 8, Title 15, sec. 601 et seq. 18, 40

Acts of the Texas Legislature:

Chapter 107, Laws of 1935 29
Acts of 1933, ch. 131, Sec. 5 37
Texas Acts 2d, C. S., 1919, p. 65, part Sec. 1 6
12 Stat. 665, c. 58 17
13 Stat. 99, c. 106 17

Textbooks:

Story on the Constitution, 4th ed. 34
Williston on Contracts, Vol. 5, 1922, §§1779-1782 31

Congressional Records, Reports, Hearings, Documents:

Page

Cong. Rec., 72d Cong., 1st Sess., pp. 1418, 1419 18
Sen. Rep. No. 769, 71st Cong., 2d Sess., pp. 2-4 ..... 20, 21, 34
Sen. Rep. No. 33, 72d Cong., 1st Sess., p. 2 18
Sen. Rep. No. 16, 73d Cong., 1st Sess. 20
H. R. Rep. No. 2169, 71st Cong., 3d Sess. 20
H. R. Rep. No. 37, 72d Cong., 1st Sess. 20
Committee Rep., pp. 2, 3, 4 on S. 4123, 71st Cong., 2d Sess. 32
The Farm Debt Problem, House Document No. 9, 73d Cong., 1st Sess., p. 32 ..... 23, 24
Holdsworth and Dewey, The First and Second Banks of the United States, Sen. Doc. No. 571, 61st Cong., 2d Sess. 16, 28
The Use of Credit Investments in Payments in the United States, Sen. Doc. No. 399, 61st Cong., 2d Sess., p. 201 (1909) 17

Hearings:

Before House Committee on Banking and Currency.
72d Cong., 1st Sess., on H. R. 5060 and 5116, pp. 10-15 ..... 18, 20
Before Committee on Irrigation and Reclamation, House of Representatives
70th Cong., 2d Sess., on H. R. 14116 20
71st Cong., 3d Sess., on S. 4123 20
72d Cong., 1st Sess., on H. R. 4650 20
Before Committee on Rules, House of Representatives
71st Cong., 3d Sess., on S. 4123 ..... 20, 21, 24
Before a Subcommittee of the Senate Committee of the Judiciary
73d Cong., 2d Sess., on S. 1868 and H. R. 7950, p. 80 21
Hearings on Banking Bill of 1935, 74th Cong., 1st Sess., p. 213 .. 17

Miscellaneous:

The Agricultural Situation, Vol. 19, No. 9, p. 18 23
Crops and Mortgages, Vol. 12, No. 7, p. 270 ..... 23, 24
Federal Reserve Bulletin, Vol. 12, No. 8, p. 520 23
Fordham, Methods of Enforcing Satisfaction of Obligations of Public Corporations, 33 Columbia Law Review 28 25
Report of the Comptroller of the Currency, 1919, Vol. 2, p. 36 17
33 Columbia Law Review 1051 25
Year Book, United States Department of Agriculture, 1935, pp. 695, 677 23
45 Yale Law Journal 702 25

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BRIEF ON BEHALF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE.

STATEMENT.

On July 17, 1934, the respondent, a water improvement district organized under the laws of the State of Texas, instituted proceedings under Section 80 of the Bankruptcy Act to refinance its outstanding indebtedness (R. 146). An amended petition was filed on August 22, 1934 (R. 3) and on the same day the court entered an order approving the peti-

tion as filed in good faith in compliance with the provisions of the Act (R. 51). Petitioners thereafter moved to dismiss the amended petition and the proceedings (R. 103-113). On December 1, 1934 the District Judge rendered an opinion holding that the proceedings should be dismissed for want of jurisdiction (R. 113-124) and on December 11, 1934 he entered judgment accordingly (R. 124-125). Respondent appealed to the Circuit Court of Appeals which reversed the judgment of the District Court (R. 144-151). The petitioners then sought and were granted a writ of certiorari by this Court (R. 153).

One of the grounds upon which the petitioners rely in their attack upon the validity of the proceedings instituted pursuant to Section 80 of the Bankruptcy Act is the alleged inability of the Reconstruction Finance Corporation to lend the funds which are to be used for the purpose of refinancing the respondent's indebtedness. The Reconstruction Finance Corporation (hereinafter sometimes referred to as the "R. F. C.") is therefore directly interested in the determination of this case.

SUMMARY OF ARGUMENT.

It is submitted, *first*, that the case should be remanded without decision of the constitutional questions raised, both because of jurisdictional defects and because this is not an appropriate case for determining those important constitutional questions; *second*, that if this Court should decide to hear the appeal on the merits, the activities of the Reconstruction Finance Corporation referred to by the Petitioners are not a proper subject for consideration at this time; and *third*, that, in any event, such activities are a traditional and valid exercise of Federal powers.

Point I.

THE CASE SHOULD BE REMANDED WITHOUT DECISION OF THE CONSTITUTIONAL QUESTIONS RAISED, BOTH BECAUSE OF JURISDICTIONAL DEFECTS AND BECAUSE THIS IS NOT AN APPROPRIATE CASE FOR DETERMINING THOSE IMPORTANT QUESTIONS.

An examination of the record in connection with the preparation of this brief has revealed several matters which seem to make it impossible for this Court to pass upon the important questions of constitutional law which the petitioners have endeavored to raise. It is believed that the Court should be informed of all these matters at this time. For that reason they are briefly discussed below.[1]

A.

The Circuit Court of Appeals apparently had no jurisdiction to enter the judgment below because the appeal from the District Court was improperly taken.

Proceedings were instituted in the District Court under Section 80 of the Bankruptcy Act. Petitioners thereafter moved in those proceedings for a dismissal of the respondent's first amended petition (R. 103).[2] The motion was granted (R. 124) and the respondent then attempted to appeal *without the consent of the Circuit Court of Appeals.* The appeal, so taken, was a nullity.

It appears to be settled that an appeal from an order or judgment dismissing a bankruptcy proceeding and the pe-

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[1] We have called the attention of counsel for the petitioners and for the respondent to these matters and assume that they will consider these points in their briefs or in oral arguments.

[2] The record is silent as to the disposition of the original Petition.

tition instituting the same can be taken only under Section 24(b) of the Bankruptcy Act. *Meyer* v. *Kenmore Hotel Co.*, Nos. 375-376, October Term, 1935; *Valley* v. *Northern Fire Insurance Co.*, 254 U. S. 348; *Wilkerson* v. *Cooch*, (C. C. A.-9th) 78 Fed. (2d) 311; *Humphrey* v. *Bankers Mortgage Co.*, (C. C. A.-10th) 79 Fed. (2d) 345, 350; *Mason* v. *Hardy*, (C. C. A.-10th) 45 Fed. (2d) 587. Under that section the Circuit Court of Appeals has no jurisdiction in connection with such an appeal unless the appeal has been taken within thirty days and unless the Circuit Court of Appeals has *consented* to the taking of the appeal. The absence of such consent is not remedied by the fact that the permission of the District Court may have been secured. *Meyer* v. *Kenmore Hotel Co., supra; Deeley* v. *Cincinnati Publishing Co.* (C. C. A.-6th) 23 Fed. (2d) 920; *In re Federal Photo Engraving Corporation*, (C. C. A.-2d) 54 Fed. (2d) 628; *Wingert* v. *Smead*, (C. C. A.-4th) 70 Fed. (2d) 351; *Vitagraph* v. *St. Louis Prop. Corp.*, (C. C. A.-8th) 77 Fed. (2d) 590; *Wilkerson* v. *Cooch, supra; Humphrey* v. *Bankers Mortgage Co., supra. Clemons* v. *Liberty Corp.*, (C. C. A.-5th) 61 Fed. (2d) 448, and *Gulbransen Co.* v *Couch*, (C. C. A.-5th) 61 Fed. (2d) 933, appear to indicate a contrary result but can no longer be regarded as good law in view of the recent decision in *Meyer* v. *Kenmore Hotel Co., supra.* It should, in any event, be noted that the Circuit Court of Appeals in each of those cases expressly allowed the appeal after a provisional allowance by the District Judge (see Rule XXXIX of the Circuit Court of Appeals for the Fifth Circuit). The Circuit Court of Appeals has not at any time allowed the appeal in this case.

Since the petition for leave to appeal in this case was addressed to and granted by the District Court rather than the Circuit Court of Appeals (R. 130-131), the Circuit Court of Appeals never acquired jurisdiction to hear the appeal and the appeal should have been dismissed. This case should therefore be remanded to the Circuit Court of Ap-

peals for that purpose. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449; *Stratton* v. *St. Louis South Western Railroad*, 282 U. S. 10; *Great Southern Fire Proof Hotel Company* v. *Jones*, 177 U. S. 449.

Even if the Circuit Court of Appeals had jurisdiction to hear the appeal it is believed that this case should be remanded for the further reasons set out in paragraphs "B," "C," and "D" *infra*.

B.

Several important facts necessary for a proper determination of the constitutional questions raised by the petitioners are not contained in the record.

A proper determination of the constitutional issues involves a consideration of a number of important facts which are not found in the record, including the following:

(a) The record does not disclose whether the petitioners are secured or unsecured creditors. Their exact status in that connection would seem to be of controlling importance in determining the applicability of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 588-589, upon which the petitioners place great reliance.

(b) The record does not furnish the terms and conditions of the bonds held by the petitioners. Hence only by conjecture may it be assumed that the petitioners' rights, as stated in those undisclosed documents, are being invaded by the institution of proceedings under Section 80 of the Bankruptcy Act.

(c) The record contains no copy of the Charter, By-laws or other rules or regulations, if any, under which the District is operating and fails to disclose the nature of the activities in which the District is engaged. Because of the absence of any factual data on this point it cannot be determined from the record whether the activities of

the District are proprietary or governmental. This point may be of controlling importance in determining whether the Bankruptcy Act may properly be availed of by the District. It should be noted that despite the absence of a factual basis therefor, the District Court assumed and petitioners assert that respondent's activities are governmental rather than proprietary, and that consequently Section 80 cannot be applied to the respondent's activities. On the other hand, the respondent has alleged in its second amended petition that it "was created as a promotion project for the colonization and development of lands" (R. 56).

(d) It is impossible to determine from the record whether this District was established "for co-operation with the United States under the Federal Reclamation Laws for the purpose of the construction of irrigation works, including drainage works, necessary to maintain the irrigability of the land for the purchase, extension, operation or maintenance of constructed works or for the assumption, as principal or guarantor, of indebtedness to the United States on account of District lands." (Texas Acts, 2d C. S., 1919, p. 65, part Sec. 1.) The record also fails to disclose whether the District has erected or maintains levies which may serve an essential function in flood control and other recognized national purposes. Obviously, the extent to which the Federal Government may legislate for the District may depend upon its status in those respects.

In view of these deficiencies, which were noted in part by the District Court,[3] the case should be remanded for de-

[3] See opinion of District Court (R. 114) where it is pointed out that "the Petition wholly fails to set forth the time of, manner of, and authority for, the organization of Petitioner as a Water Improvement District, which it claims to be, and fails to set forth clearly the date, manner of issue, number, amount and terms and conditions of the Bonds which Petitioner seeks to have readjusted * * *."

termination of these essential facts. *Liverpool, New York and Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33; *Hendrick* v. *State of Maryland*, 235 U. S. 610; *Borden's Farm Products Co., Inc.*, v. *Baldwin*, 293 U. S. 194.

In *Liverpool, New York and Philadelphia Steamship Co.* v. *Commissioners of Emigration, supra*, this Court refused to pass upon the constitutionality of an Act of Congress, stating (p. 39):

> "If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as a hypothesis, and pass upon the constitutionality of an Act of Congress as an abstract question. That is not the mode in which this Court is accustomed or willing to consider such questions. • • •
>
> "In the present case, the main and ultimate question is whether the defendant is legally liable to repay the moneys sued for, and, as incidental to that, whether the Act of Congress pleaded as a bar to the action is valid. *The solution of these questions depends upon facts not apparent upon the present record. That these may be made to appear there must be a new trial.*" (Italics added.)

In *Hendrick* v. *State of Maryland, supra*, this Court refused to pass on certain questions relating to the constitutionality of an automobile license tax because "as the capacity of the machine owned by plaintiff-in-error does not appear, he cannot complain of discrimination because fees are imposed according to engine power" (p. 624).

A recent reiteration of these views is found in *Borden's Farm Products Co., Inc.* v. *Baldwin, supra*, where this Court refused to pass upon the constitutionality of a statute during the preliminary stages of a proceeding

instituted to enjoin the enforcement thereof. In that case this Court stated (p. 212-213):

> "* * * that before the questions of constitutional law, both novel and of far reaching importance, were passed upon by this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence' * * *".

Here, too, it would seem to be inadvisable to pass upon the constitutional questions raised by petitioners at this preliminary stage of the proceeding while the record is silent as to facts which may well be determinative of the issues raised.

C.

The threatened loss to the petitioners is too hypothetical and speculative to raise a substantial Federal question.

It does not appear from the record that the petitioners are threatened with any loss in connection with the reorganization. The claim that they are threatened with loss by reason of proceedings under Section 80 is based on these highly speculative and hypothetical assumptions: (a) that the plan on hearing would not be modified by the court in a manner satisfactory to the petitioners; (b) that the District Judge, who has stated that the proceeding is "unfair and inequitable" (R. 124) would find, after the hearing and over petitioners' objections, that the plan "is fair, equitable, and for the best interests of the creditors, and does not discriminate unfairly in favor of any class of creditors";[4] and (c) that the plan as finally approved will operate to the injury and detriment of the petitioners herein. The above assumptions are merely conjectural and furnish no substantive basis for the determination of the

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[4] Section 80(e) of the Bankruptcy Act.

constitutional questions involved in this appeal. In *Abrams et al.* v. *Van Schaick*, 293 U. S. 189, where a similar state of facts existed, this Court refused to pass upon the constitutionality of a New York statute providing for the reorganization of real estate mortgage investments because (p. 189):

> "Whether, if a plan of reorganization is promulgated by the Superintendent of Insurance it will be approved by the Court as required by the statute, or whether, if so approved, it will be opposed by certificate holders, or will receive the assent of the present appellants, or will operate to deprive them of any asserted constitutional right, are matters of conjecture.
>
> "The appeal is dismissed for the want of a substantial Federal question. *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39, 28 L. Ed. 899, 901, 5 S. Ct. 352; *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 314, 37 L. Ed. 747, 748, 13 S. Ct. 876; *Stearns* v. *Wood*, 236 U. S. 75, 78, 59 L. Ed. 475, 476, 35 S. Ct. 229; *Cincinnati* v. *Vester*, 281 U. S. 439, 449, 74 L. Ed. 950, 956, 50 S. Ct. 360."

Point II.

THE VALIDITY OF THE LOAN AUTHORIZATION BY THE R. F. C. TO CAMERON COUNTY WATER IMPROVEMENT DISTRICT NO. 1 AND THE STATUTE AUTHORIZING THE LOAN SHOULD NOT BE DETERMINED IN THIS CASE.

We submit that on the record in this case petitioners have no standing to attack the validity of the loan authorization by the R. F. C. to Cameron County Water Improvement District Number One and the statute authorizing the loan, that no substantial Federal question is raised with respect thereto and that no adequate record is presented for the determination of such questions.[5]

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[5] Neither the opinion of the District Judge (R. 113-124) nor that of the Circuit Court of Appeals (R. 141-150) found the questions of sufficient relevancy to pass upon them.

A.

Petitioners are not injured by the loan authorization by the R. F. C. or by the statute authorizing the loan.

This Court has held many times that no one will be heard to attack an Act of Congress unless he is injured by its application. See *Concordia Insurance Co.* v. *Illinois*, 292 U. S. 535, 547; *New Jersey* v. *Sargent*, 269 U. S. 328; *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Hendrick* v. *Maryland, supra.* Petitioners complain that the readjustment proceedings may result in a reduction of the face value of the obligations held by them, but they mistake the source of their alleged injury. The R. F. C. was designated by Congress [6] merely to supply funds to agricultural improvement districts that have determined independently that such funds will enable them more readily to refinance outstanding indebtednesses. These funds may become available whether the financial readjustment occurs by voluntary agreement between the creditors and the District or under existing provisions of law governing such readjustments. If the readjustment is voluntary, petitioners cannot be compelled to surrender their bonds; only in proceedings instituted under Section 80 of the Bankruptcy Act, which authorizes confirmation of a plan of readjustment on the approval of 66⅔% of the creditors affected and makes the plan binding on dissenters, can petitioners be compelled to surrender their obligations. Their alleged injury arises, therefore, by the action of their fellow-creditors under the provisions of the Bankruptcy Act, not by operation of the statute governing the R. F. C. This case is strikingly similar to *Railroad Co.* v. *Ellerman*, 105 U. S. 166, where this Court held that one who is injured by the competition of a corporation may not raise

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[6] The text of the statute will be found in the Appendix at p. 40.

the issue of *ultra vires* since the source of his injury is the competition, not the illegality of the corporation's act. This Court said (at p. 173):

> "The sole remaining question, then, is, whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the Joint Resolution. * * * If he asserts that the competition of the railroad company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is that a violation of its charter does not of itself injuriously effect any of his rights. The company is not shown to owe him any duty which it has not performed."

B.

The questions raised by petitioners, with respect to the Reconstruction Finance Corporation, do not relate to the jurisdiction of the District Court.

The sole question below was the jurisdiction of the District Court to entertain the petition filed by the Water Improvement District. That the loan authorization from the Reconstruction Finance Corporation was not only subject to alteration, but also may be entirely rejected, appears readily from a consideration of Section 80.[7] *First*, it should be noted that Section 80 has broad provisions for the modification of the plan of readjustment originally filed. Under Section 80(c), the Bankruptcy Court must direct the District to give notice to creditors in order that a hearing may be had on the plan and any changes or modifications be considered.

[7] It should be noted that neither funds nor an agreement to procure funds are prerequisite for reorganization under Section 80 of the Bankruptcy Act.

Section 80(c) makes provision for changes and modifications in the plan at any stage in the proceedings and for the right of any creditor, who may previously have accepted the plan and been injured by the change or modification, to withdraw his acceptance. Nor may the Bankruptcy Court confirm the plan unless it is satisfied that it is fair and equitable and in the best interests of the creditors, and that the District is legally authorized to take all steps contemplated by the plan. *Second*, under Section 80(c), the Bankruptcy Court has power, with the approval of the District, to direct the rejection of executory contracts of the District, including, of course, the loan authorization by the R. F. C.

None of these steps has yet been taken. It would seem that the loan authorization by the R. F. C. could be completely altered or rejected without defeating the jurisdiction of the District Court. It follows, therefore, that the validity or invalidity of the loan authorization is not determinative of the jurisdiction of the Bankruptcy Court over the petition when filed. One effect of a contrary contention would be to require the tentative plan to contain all the essentials of the plan ultimately to be confirmed. Another effect would be to make meaningless many of the provisions of the Bankruptcy Act, such as the requirement that, prior to confirmation, the District Court must determine if the District is legally authorized to take all contemplated steps, and the authorization to the District to reject executory contracts. Still another effect would be to raise, at this time, questions for which Section 80 of the Bankruptcy Act has provided an orderly proceeding.

Petitioners will have ample opportunity to raise the questions here raised if the Bankruptcy Court confirms the plan. This Court will pass upon constitutional questions only when necessary to determine the direct and immediate rights of the parties. *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158; *Interstate Busses Cor-*

poration v. *Holyoke Street Railway Company*, 273 U. S. 45. As this Court said in *Steamship Co.* v. *Emigration Comm.*, 113 U. S. 33, 39, it will not "anticipate a question of constitutional law in advance of the necessity of deciding it."

C.

In any event petitioners' alleged injury is at this time too remote and speculative to permit petitioners to press their constitutional objections.

Assuming without conceding that petitioners are able to trace their alleged injury to the loan authorization by the R. F. C., it is submitted that any such injury is at this time too remote and speculative to permit petitioners to press their objections.[8]

It has been demonstrated in subdivision B hereof that the plan of readjustment has numerous obstacles to survive before its confirmation. Petitioners' attitude towards the final plan can no more be ascertained at this time than can the final plan itself. This Court recently said:

> "At this stage appellant can show no more than apprehension that the definition which the administrative officer will lay down may be deficient. The Constitution cannot allay that fear." *Pac. Tel. & Tel. Co.* v. *Seattle*, 291 U. S. 300, 304.

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[8] It is well settled that no litigant will be heard to attack a statute when the injury said to result from its application may never occur. *New Jersey* v. *Sargent*, 269 U. S. 328; *Boston & Maine R. Co.* v. *Armbrug*, 285 U. S. 234, 240; *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 313; *Alabama* v. *Arizona*, 291 U. S. 286, 292; *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219-220; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457; *Delaware & Hudson Co.* v. *United States*, 266 U. S. 438, 440.

More recently it emphasized again, under closely analogous circumstances, that it will not hear an attack on a statute whose application is so remote and so speculative. In *Abrams* v. *Van Schaick, supra,* this Court dismissed the appeal for want of a substantial federal question, stating (at p. 189):

> "Whether, if a plan of reorganization is promulgated by the Superintendent of Insurance it will be approved by the Court as required by the statute, or whether, if so approved, it will be opposed by certificate holders, or will receive the assent of the present appellants, or will operate to deprive them of any asserted constitutional right, are matters of conjecture."

Here a plan of readjustment has been presented and appears, at this time, to have been approved by the requisite number of bondholders (R. 11). But these creditors may withdraw their approval if a modification adverse to them is made (Sec. 80(e)). The judge may refuse to confirm the plan. The petitioners may conclude that the plan is desirable in the light of changed economic conditions. It is evident that any attempt to distinguish the degrees of conjecture present in the *Abrams* case and in the case at bar must be illusory, and that the statute here under attack is as uncertain of adverse application to the petitioners as was the statute in the *Abrams* case.

D.

No adequate record for the determination of such questions is presented.

We submit that questions of constitutionality relating to important lending powers of the R. F. C. should not be passed upon by this Court until the Corporation has had an opportunity to present, upon proper hearing, sufficient facts to disclose the nature and effect of its operations. See

cases cited *supra*, page 7, and compare *Texas* v. *Interstate Commerce Commission*, *supra*, at pages 162 and 163, where this Court said:

> "Even if these allegations, in connection with other parts of the bill, could be regarded as presenting a concrete controversy turning on the validity of Title III, this would not enable us to entertain the suit. The bill makes it plain that the carriers and employees have put the Board's decisions into effect, and have adjusted their relations on that basis. There are none to whom the controversy would be of such immediate concern as to them; and, should it be resolved against the validity of Title III and the Board's action annulled, their interests would be directly and unavoidably affected. They are not parties to the bill; nor do any of those who are parties represent them."

Point III.

THE STATUTE AUTHORIZING THE LOAN PROPOSED TO BE MADE BY THE RECONSTRUCTION FINANCE CORPORATION IS A TRADITIONAL AND PROPER EXERCISE BY CONGRESS OF FEDERAL POWERS.

We have urged that this Court should not hear the appeal and that, in any event, petitioners cannot raise the question of the constitutionality of the loan proposed to be made by the Reconstruction Finance Corporation to Cameron County Water Improvement District or of the statute authorizing the loan. If, however, this Court should be of the opinion that such a question has been raised, we submit that the functions of the Reconstruction Finance Corporation here involved are undertaken in an appropriate and traditional exercise of powers conferred upon the Federal Government by the Constitution.

A.

Fiscal Powers.

The Constitution confers upon Congress a series of powers—to borrow money on the credit of the United States, to lay and collect taxes, to coin money and regulate the value thereof—which in the aggregate are frequently referred to as the "fiscal" power of Congress. Their source and nature have recently been well defined in *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, where this Court said (at p. 303):

> "The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers."

Under these powers, it was decided in the early cases of *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Osborn* v. *Bank*, 9 Wheat. 738, that Congress could create a Federal banking corporation with broad credit as well as currency powers.[9] Throughout the subsequent years Congress has

[9] It is significant that the First and Second Banks of the United States engaged in a wide variety of lending functions. These included ordinary commercial loans to individuals, operations in foreign exchange, acquisition of real estate mortgages and loans to State banks. See *Holdsworth and Dewey*, The First and Second Banks of the United States, Sen. Doc. No. 571, 61st Cong., 2d Sess., *passim*, and the balance sheets reprinted at pp. 308-311.

continually recognized its obligation to provide a national system of financial institutions for handling the credit and exchange requirements of agriculture, industry and commerce. Familiar examples are found in the establishment of national banks (c. 58, 12 Stat. 665; c. 106, 13 Stat. 99), the Federal Reserve System (c. 6, 38 Stat. 251), and the Federal Farm Loan System (c. 245, 39 Stat. 360). In *Farmers' National Bank* v. *Dearing,* 91 U. S. 29, 33, the national banks were declared "instruments designed to be used to aid the Government in the administration of an important branch of the public service." This statement was made more than 60 years ago. Today currency has largely been supplanted by credit instruments serving as a medium of exchange,[10] and the fiscal powers of Congress are accordingly much more intimately related to the financial structure of loans and deposits. Today, too, Congress could not successfully exercise its powers to tax and to borrow in a paralyzed financial community.

It has also been long held by this Court that Congress, once having established these valid fiscal agencies, has the correlative power to take such measures as are necessary to protect and preserve them. *McCulloch* v. *Maryland, supra,* p. 424; *Farmers' National Bank* v. *Dearing, supra,* p. 34; *First National Bank* v. *Union Trust Company,* 244 U. S. 416, and *Westfall* v. *United States,* 274 U. S. 256.

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[10] See statement by Marriner S. Eccles, Governor of the Federal Reserve Board, in Hearings on Banking Bill of 1935, 74th Congress, 1st Session, page 213, where it was estimated instruments of credit were used in over 90%, by dollar volume, of all exchange transactions. The figure was estimated at 94.1% in the report of the Comptroller of the Currency, 1919, Vol. 2, page 36, and as 80 to 85% in "The Use of Credit Investments in Payments in the United States", Senate Document No. 399, 61st Congress, 2d Session, p. 201 (1909).

In the exercise of these powers, Congress, in January 1932, created the Reconstruction Finance Corporation (c. 8, 47 Stat. 5, U. S. C. Title 15, sec. 601 et seq.) as a corporate banking institution of the United States. As the declarations in the Act itself,[11] in the Senate Report on the Act,[12] in the House Committee hearings,[13] and before Congress by the sponsors of the Act,[14] uniformly reveal, the Corporation was intended to give temporary financial aid to distressed agricultural, financial and commercial institutions and railroads, in an effort to stabilize abnormal financial conditions, to strengthen the national credit and currency system and to assist fiscal institutions, including those created by Congress.[15] Many leading fiscal and finan-

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[11] Sections 2 and 5 of the Reconstruction Finance Corporation Act, and as amended, 15 U. S. C., Secs. 602, 605.

[12] Senate Report No. 33, 72d Cong., 1st Sess., p. 2.

[13] Hearings before House Committee on Banking and Currency, 72d Cong., 1st Sess., on H. R. 5060 and 5116, pp. 10-15.

[14] Congressional Record, 72d Cong., 1st Sess., pp. 1418, 1419.

[15] It should be noted that the R. F. C. Act provides in Section 12 that

> "when designated for that purpose by the Secretary of the Treasury the Corporation shall be a depositary of public moneys * * * and it may also be employed as a financial agent of the government; and it shall perform all such reasonable duties, as depositary of public money and financial agent of the government, as may be required of it."

These provisions are strikingly similar to provisions in *Smith* v. *Kansas City Title Company*, 255 U. S. 180, where the court sustained the constitutionality of Federal Land Banks on the ground that they were appropriate agencies

cial authorities testified to the need of such supplemental and temporary credit facilities.[16]

As stated by Mr. Justice Cardozo in *Baltimore National Bank* v. *Maryland State Taxing Commission*, No. 283, October Term, 1935:

> " the purpose that it [Reconstruction Finance Corporation] has aimed to serve is not profit to the government though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance in industry and commerce threatened with prostration as the result of the great depression."

The specific power of the R. F. C. pursuant to which it authorized a loan to Cameron County Water Improvement District No. One was conferred by the Emergency Farm Mortgage Act of 1933. The need for such an enactment had received detailed consideration by Congress since 1928

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to aid in the execution of the fiscal powers of the federal government and said (p. 211):

> "We therefore conclude that the creation of these banks, and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds, brings them within the creative power of Congress, *although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest.* This does not destroy the validity of these enactments any more than the general banking powers destroy the authority of Congress to create the United States bank, or the authority given to national banks to carry on additional activities destroy the authority of Congress to create those institutions." (Italics supplied.)

[16] Those who testified included Eugene Meyer, then Governor of the Federal Reserve Board; Ogden L. Mills, then Under-Secretary of the Treasury; George Harrison, then

when such a bill was first introduced.[17] It is but one phase of the general problem of agricultural credit. That it was so considered by Congress is revealed in the extensive hearings [18] and numerous reports [19] on the various bills introduced between 1928 and 1932. The hearings and reports evidence a widespread concern with the heavy and fre-

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Governor of the Federal Reserve Bank of New York; Phillip A. Benson, Treasurer of the Dime Savings Bank of Brooklyn, New York, and Chairman of the Investment Committee of the National Association of Savings Banks; Frederick H. Ecker, President of the Metropolitan Life Insurance Company of New York; Morgan B. Brainard, President of the Aetna Life Insurance Company; Henry Bruere, President of the Bowery Savings Bank of New York; Melvin A. Traylor, President of the First National Bank of Chicago, Illinois; Wilson W. Mills, Chairman of the Board, Peoples Wayne County Bank, Detroit, Michigan; J. C. Traphagen, representing the Bank of New York. See Hearings before House Committee on Banking and Currency (72d Cong., 1st Sess.) on H. R. 5060 and 5116.

[17] Numerous bills were introduced in the 70th Congress and after. See H. R. 14116, H. R. 17333 and S. 4689 of the 70th Congress; H. R. 1410 and S. 4123 of the 71st Congress; H. R. 4650 and S. 1856 of the 72d Congress; H. R. 3835, H. R. 4795 and S. 1110 of the 73d Congress.

[18] See Hearings Before Committee on Irrigation and Reclamation, House of Representatives, on H. R. 14116, 70th Congress, 2d Session; on S. 4123, 71st Congress, 3d Session and on H. R. 4650, 72d Congress, 1st Session. See also Hearings Before Committee on Rules, House of Representatives, on S. 4123, 71st Congress, 3d Session.

[19] See Senate Report No. 769, 71st Congress, 2d Session; House of Representatives Report No. 2169, 71st Congress, 3d Session; House of Representatives Report No. 37, 72d Congress, 1st Session and Senate Report No. 16, 73d Congress, 1st Session.

quently unsound tax and debt burdens of farming communities,[20] with the abnormally low income of farming communities,[21] and with the necessity of integrating contemplated credit relief with existing facilities for agricultural credit.[22]

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[20] In the transcript of the Hearings Before a Subcommittee of the Senate Committee on the Judiciary, on S. 1868 and H. R. 5950, 73d Congress, 2d Session, the following statement appears in a letter signed by J. H. Guill, Deputy Land Bank Commissioner:

> "On the other hand many districts are overindebted, in view of the character and normal earning power of the land and the state of the district's development. The cause of default in many such cases cannot be charged to the recent low prices of farm products. In such districts, and where maintenance is neglected or no definite maintenance policy established, there can be no sound basis for long term loans until refinancing has been carried out and adequate maintenance provided for."

and the following statement appears in a letter signed by Douglas Orr, an official of the Home Owners' Loan Corporation:

> "However, in many drainage districts and other taxing districts, the default of the taxing authority upon its obligations has led to such high assessment rates, that not infrequently the unpaid taxes run the amount of the liens against the property up so high that the Corporation cannot relieve the owner since the liens existing amount to more than 80% of the appraised value and the owner is thus made ineligible under the act."

[21] See *infra* notes 25 and 26.

[22] See, for example, Senate Report No. 769, 71st Cong., 2d Sess., pp. 3-4; Hearings Before Committee on Rules, House of Representatives, on S. 4123, 71st Cong., 3d Sess., pp. 84-89.

Thus the statute under consideration was finally enacted as a part of the Emergency Farm Mortgage Act of 1933 which dealt with necessary modifications and revisions of existing governmental agricultural banks.

These institutions have as a common goal the establishment of adequate agricultural credit and adopt substantially identical means of accomplishing this end. The most important of these have been considered by this Court on a number of occasions. First, in *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, this Court upheld the power of Congress to establish the Federal Land Banks. Thereafter, in *Federal Land Bank* v. *Gaines*, 290 U. S. 247, the Court said (p. 250):

> "The Federal Farm Loan Act was adopted in response to a national demand that the Federal government should set up a rural credit system by which credit, not adequately provided by commercial banks, should be extended to those engaged in agriculture, upon the security of farm mortgages."

Again (at p. 254) it said that the Federal Land Banks and National Farm Loan Associations were:

> "* * * in a broad and general sense, public agencies or instrumentalities to carry out a policy of the government—the extension of credit to those engaged in agriculture to be availed of in the furtherance of agricultural undertakings * * *."

Finally, in *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231, this Court said that Federal Land Banks were "engaged in the performance of an important governmental function". The extension of agricultural credit by the R. F. C. here involved, serving the same ends by the same means, can be no less governmental. It should further be noted that,

aside from the extension of agricultural credit, many of these banks have other important Federal functions.[23]

As has been shown, *supra*, p. 17, Congress, once having established such valid fiscal agents, has the correlative power to take reasonable measures that are, at least in part, directed to their protection and preservation. These agricultural credit agencies have, of course, advanced large sums on the security of farm mortgages.[24] In the late twenties, with an abrupt drop in farm income,[25] there

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[23] Particularly notable is their authority to have federal funds on deposit and to act as fiscal agents of the United States (see Federal Farm Loan Act, Sec. 6), and their authority to invest in federal obligations. See Federal Farm Loan Act, Sec. 13; c. 245, Sec. 22, 39 Stat. 378; c. 252; Title III, § 309, 42 Stat. 1477. These powers were considered of primary importance in *Smith* v. *Kansas City Title Co.*, *supra*, which, as we have seen, sustained the constitutionality of Federal land banks.

[24] In 1928 Federal land banks and joint stock land banks together held in excess of $1,500,000,000 farm mortgage loans and this figure has increased steadily until in 1935 it amounted to approximately $2,250,000,000. This amounts to approximately 18% of the total farm mortgage debt. Year Book, United States Department of Agriculture 1935, p. 695; Federal Reserve Bulletin, Vol. 12, No. 8, p. 520; The Agricultural Situation, Vol. 19, No. 9, p. 18; The Farm Debt Problem, House Document No. 9, 73d Congress, 1st Session, p. 32.

[25] From an estimate of approximately $17,000,000,000 in 1919, farm income dropped to an average of around $12,000,000,000 between 1923 and 1929, and to approximately $9,500,000,000 in 1930, to approximately $7,000,000,000 in 1931 and to approximately $5,000,000,000 in 1932. Farm price indices, based on 100 par in 1909 through 1914, dropped from 156 in 1925 to 65 in 1932. Year Book, op. cit. *supra*, Note 24, p. 673; Crops and Mortgages, Vol. 12, No. 7, p. 270.

followed a correspondingly abrupt rise in loan delinquencies.[26] It was inevitable that this situation should have caused a severe strain on the Government's agricultural credit agencies, threatening to impair the exercise of their Federal functions.[27] Water charges and taxes, which are superior to the mortgage of farm loans,[28] and heavy unsound tax burdens, contributed materially to these difficulties. Financial aid to enable these districts to readjust disproportionate tax burdens thus contributes to relieving the strain on these agricultural banks.[29] Since these banks are exercising proper Federal functions, the functions of the R. F. C. in extending aid that protects them are no less proper.

That the measures taken are reasonable and appropriate becomes clear when it is noted that the readjustments involve no compulsion whatever by the R. F. C. upon districts or their creditors; the R. F. C. merely holds itself ready to advance funds when they will facilitate readjustments that will be consummated voluntarily between districts and

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[26] Loan delinquencies on Federal land bank loans rose from 4.8% in 1925 to 53.2% in 1932. Crops and Mortgages, Vol. 12, No. 7, p. 270.

[27] It should be noted that the price at which the bonds of these institutions could be sold fell to a point where they could not relend at a rate high enough to meet operating expenses. The Farm Debt Problem, House Document No. 9, 73d Cong., 1st Sess., p. 32.

[28] See Hearings before a Subcommittee of the Senate Committee of the Judiciary, on S. 1868 and H. R. 5950, 73d Congress, 2d Session, p. 80.

[29] It has been estimated that the outstanding bonded indebtedness of irrigation and drainage districts is approximately $865,000,000 and that the amount of first mortgages affected in those areas is approximately $1,100,000,000. Hearings, op. cit, *supra*, Note 28, p. 71.

their creditors or pursuant to existing law. Furthermore, in view of the disproportionate tax and water charges in many areas, creditors of the community should welcome a readjustment which will insure partial payment according to the value of their holdings, instead of almost certain default and loss.[30] The resulting reduction in the fixed charges borne by the farm mortgagor is permanent and the improvement does not depend upon the annual Congressional largesse which would be necessary were a more direct form of relief adopted. For a similar credit facility extended by the Federal government see *U. S.* v. *Guaranty Trust Co.*, 280 U. S. 483.

It is immaterial that the loan here authorized is to be made neither to the Federal farm credit agencies nor to the indebted farmer. That the method adopted instead permits a water improvement district to be the borrower is of no significance. It is well recognized that the Constitution does not confine the functions of fiscal agencies within mechanical and rigid boundaries. In *First National Bank* v. *Union Trust Company, supra*, this Court held that Congress could authorize national banks to act as trustees, executors and administrators in States in which State banks were so empowered, in order that national banks might not be prejudiced in their functions. In reviewing earlier decisions, this Court recognized (p. 420) that:

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[30] It is significant that the second amended petition in this case shows that $700,000 of the $800,000 bonds outstanding had been deposited for payment at 49% (R. 84). For the illusory remedy of a security holder in the event of such default see Fordham, *Methods of Enforcing Satisfaction of Obligations of Public Corporations*, 33 Columbia Law Review 28; 45 Yale Law Journal 702; 33 Columbia Law Review 1051; *City of Asbury* v. *Christmas*, 78 Fed. (2d) 1003 (C. C. A. 3rd).

> "* * * although a particular character of business might not be, when isolatedly considered, within the implied power of Congress, if such business was appropriate or relevant to the banking business, the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful",

and reversed the lower court decision:

> "* * * Because the opinion of the Court instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank and ascertained the existence of the implied authority to confer them by considering them as segregated, that is, by disregarding their relation to the bank as component parts of its operations, a doctrine which, as we have seen, was in the most express terms held to be unsound in both of the cases."

In *Smith* v. *Kansas Title Co., supra,* these thoughts were further developed when the Court said (pp. 210-211):

> "That Congress has seen fit, in making these banks fiscal agencies and depositaries of public moneys, to grant to them banking powers of a limited character, in nowise detracts from the authority of Congress to use them for the governmental purposes named, if it sees fit to do so.
>
> "We therefore conclude that the creation of these banks, and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds, brings them within the creative power of Congress, although they may be in-

tended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create those institutions."

Most recently this doctrine was alluded to in *Baltimore National Bank* v. *Maryland State Taxing Commission*, No. 283, October Term, 1935, where this Court said:

> "We assume, though without deciding even by indirection, that within *McCulloch* v. *Maryland*, 4 Wheat. 316, a corporation so conceived and operated is an instrumentality of the government without distinction in that regard between one activity and another."

These authorities should be considered together with another pertinent line of decisions culminating in *United States* v. *California*, No. 33, October Term, 1935. There, under the commerce clause, this Court permitted Federal regulation of a State owned railroad saying that "The State can no more deny the power if its exercise has been authorized by Congress than can an individual." It would seem to follow from these cases that properly constituted Federal credit agencies have not exceeded traditional and proper Federal powers when they have acquired the obligations of State-regulated utilities, municipalities and other political subdivisions and of the States themselves. It is illuminating that the First and Second Banks of the United States *had express power to lend to States*.[31]

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[31] See *Holdsworth & Dewey*, First and Second Banks of the United States, Senate Document No. 571, 61st Cong., 2d Sess., pp. 130, 275.

The terms and conditions of the loan, provided in Section 36 of the Emergency Farm Mortgage Act of 1933, and in greater detail in the loan authorization of the R. F. C. (R. 61), limited as they are to the life of the loan, are merely the reasonable safeguards of a creditor seeking to assure repayment, and are incidental to the purposes of the loan. We have demonstrated that a loan, such as is here involved, falls within the traditional range of Federal powers. It must follow that conditions and terms so limited as to be incidental to the valid function and to the obligation to repay are likewise within the scope of legitimate Federal powers. Furthermore, though incidental, these conditions are essential to make the obligation enforceable and to preserve a valid Federal power from nullification. Then, too, Federal funds, like other property of the United States, are "held in trust for the people of the whole country," *United States* v. *Beebe*, 127 U. S. 338, and the Federal Government is clothed with the power to protect its property from harm and waste. *Ashwander* v. *Tennessee Valley Authority*, Nos. 403-404, October Term, 1935; *Pan American Co.* v. *U. S.*, 273 U. S. 456, 501; *U. S.* v. *Munday* 222 U. S. 175, 181; *Kansas* v. *Colorado*, 206 U. S. 46, 92; *Camfield* v. *U. S.*, 167 U. S. 518; *U. S.* v. *Trinidad Coal Company*, 137 U. S. 160; *U. S.* v. *Gratiot*, 14 Pet. 526; *U. S.* v. *Hanson*, 167 Fed. 881; *U. S.* v. *Shryock*, 162 Fed. 790, 793. Without such conditions the Reconstruction Finance Corporation may not be able to dispose of these obligations, as improved credit conditions make it desirable that it withdraw from this field, since private investors customarily insist upon credit precautions of a like nature. Likewise, if the loan be valid, conditions necessary to its security may be imposed even though the borrower be a political subdivision of the State. Compare *U. S.* v. *California, supra.* A parallel is found in *Ruddy* v. *Rossi*, 248 U. S. 104, where this Court held that

Congress had the power to exempt from seizure by creditors property acquired from the Government by citizens, saying:

> "they may be leased, sold, or given away upon such terms and conditions as the public interests require,"

and in *U. S.* v. *Gratiot*, Fed. Cas. No. 15, 249, where the fixing of the resale price of products to be sold by a lessee of governmental mineral lands was upheld. Mr. Justice McLean (sitting as a Circuit Judge) said:

> "* * * The limitation imposed on the price of the manufactured article is a very proper regulation in the lease; as it prevents monopolies, and other consequences injurious to the public, by a combination of the lessees. The argument is not sustainable that if the United States may do this, they may engage in any other traffic, within a state, and regulate prices at pleasure. This consequence does by no means follow.
>
> "The government has a right * * * to stipulate with the lessee, as one of the conditions of his lease, that he shall sell the ore he digs, or the lead he manufactures, at a fixed price. I can see no possible objection to such a regulation. It is one that any individual, on leasing a farm, may make * * * * * * it is clear to my mind, that such a regulation in no respect interferes with the sovereignty of the state, or any local law which the state has power to pass."

That the terms and conditions, which petitioners contend would give to the R. F. C. "control of the district", are plainly no broader than is appropriate to such ends, and are subordinate to the purposes of the loan, is evident upon their examination. Addressing ourselves only to those conditions upon which petitioners have felt justified in relying, we note that they fall principally into three groups. One group deals with incidental administrative matters facilitating proper disbursement, such as Condition No. 1 of the loan authorization, which provides that all loans shall be dis-

bursed within such time as may be fixed by the R. F. C., and Condition No. 5-b, which provides that the R. F. C. may advance the funds directly to bondholders if it should be necessary that the old bonds of consenting holders be kept alive for a period of time in order to maintain a parity of rights. The second group includes provisions designed merely to give reasonable assurance of the repayment of the loan. An example is Condition 8-a of the loan authorization which provides that the District will pay to the Corporation the amount by which its collections exceed its current obligations, and portions of Condition 9 which require proper readjustment of benefits, collections of taxes and exclusion of unproductive lands (from which water charges may not be collected). The third group consists of such reasonable safeguards as unsecured creditors may properly take to protect themselves against dissipation of assets or uneconomical administration that will make ultimate repayment impossible. To this class belong such provisions as portions of Condition 8-a where the district agrees not to issue any other similar bonds, except with the consent of the Corporation, and, in order to assure economical administration and debt service over the long life of the loan, to reduce its annual taxes, *insofar as it lawfully may*, by an amount proportional to the reduction in necessary debt service, Condition 8-b whereby the district will not incur any indebtedness for which it can not pay cash from normal revenue, Condition 8-c whereby the district will permit the R. F. C. to have a representative present at meetings of the governing body, and Condition 8-j whereby the district will permit the Corporation access to its records, reports and files.

Nothing in *U. S.* v. *Butler*, No. 401, October Term, 1935, suggests that such incidental conditions are invalid, especially in a case where no claim is, or can be, made that there

is coercion in fact or law to induce the borrowing of monies from the R. F. C. The Court did not condemn all governmental contracts; its emphasis is important here:

> "• • • appropriations and expenditures under contracts for proper governmental purposes can not justify contracts which are not within the Federal power."

The Court condemned any attempt by contract or otherwise to impose a system of regulation that was beyond the federal power, and an illustration given by it points clearly to the difference between that case and this. The Court said:

> "• • • an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive to the Constitution is clearly bad."

In contrast the terms and conditions here are incidental in purpose and incidental to a constitutional power to extend agricultural credit, are of the sort properly required by a creditor, and are essential to prevent waste and to preserve a traditional federal power from nullification.[32]

B.

General Welfare.

The statute and loan authorization here under consideration draw Constitutional support from another source as well. This Court in *United States* v. *Butler, supra,* said that:

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[32] If this Court should determine that any of the terms or conditions are invalid, it is submitted that the remainder of the contract, if it may still be given substantial effect, should be sustained. Invalid terms or conditions do not of themselves invalidate entire contracts, 5 *Williston on Contracts,* 1922, §§ 1779-1782, and the intent of Congress, to extend credit relief in an abnormal situation, withstands an incidental alteration of conditions.

> "The Congress is expressly empowered to lay taxes to provide for the general welfare * * * and Congress consequently has substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States * * *. * * * the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare."

It will not be denied that the agricultural and credit problems of the country have a profound effect upon the national welfare. True, actual agricultural activity within the states and regulation thereof may be matters of local concern, *United States* v. *Butler, supra; Kansas* v. *Colorado*, 206 U. S. 46, 87. But, in contrast, appropriate agricultural credit measures of the federal government, if national in scope and purpose, would seem to provide for the general welfare. The agricultural credit structure is an inseparable part of the banking system of the nation. Its intimate relationship to national welfare has already been demonstrated. See *supra*, pp. 16 to 25.

That the national welfare is served by the measure under consideration appears also in another way. The District to which this loan is proposed to be made is a "water improvement district." This Court has taken note of the public importance of irrigating arid lands. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 161, 164; cf. *United States* v. *Hanson*, 167 Fed. 881 (C. C. A.-8th). Widespread conservation, through reclamation of uninhabitable areas, and the protection of highly developed agricultural areas serves important public purposes.[33] Here Congress seeks merely to make loans under the general welfare power, to

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[33] As was said by Senator McNary in submitting the Committee Report, on S. 4123, 71st Congress, 2d Session, at p. 3:

> "It is a plan to save highly productive lands that are already under successful cultivation."

aid in attacking conditions which might otherwise result in a widespread waste of the natural resources of the nation. It may well be doubted that the federal government could undertake to regulate, absorb or compel the reorganization of an irrigation district created under state law. See *United States* v. *Butler, supra; Hopkins* v. *Cleary, supra.* It may well be that it could not take the place of the State in the organization and regulation of such a district which had no contact with a recognized federal interest. But such a case is not before the Court. The statute under consideration is designed to be generally available throughout the country,[34] and to offer merely a credit facility for public purposes,[35] of which prospective borrowers may voluntarily

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[34] As was said by Senator McNary in the Report, op. cit. *supra*, Note 33, at pp. 3-4:

> "The benefits of this bill, if it becomes a law, would extend to the residents of 35 states having, as shown by the 1920 census, an aggregate of 65,634,743 acres in drainage districts now operating, and in the drainage enterprises of which districts there was invested at the time the 1920 census was taken a total of $380,040,043. Since that census both the acreage and the capital invested have been increased possibly by as much as 10%. * * * The demand for this legislation is from 5,000,000 of the farm population, which, according to the 1920 census, live within these drainage districts."

[35] As was said by Senator McNary in the Report, op. cit. *supra*, Note 33, at p. 2:

> "It is not a plan to extend aid directly to individual farmers in their individual capacities, but it is a plan to aid farmers in their collective capacities where they have organized drainage districts to install and maintain public drainage works as outlets for the private drainage works of individual farmers. It is the public works, the collective or community works, authorized by and operated under authority of the law, that ought to be relieved by this bill."

and independently avail themselves. That the terms and conditions provided in the statute and the loan authorization are incidental in purpose and proper credit precautions has been shown above, pages 28 to 31.

A striking parallel may be observed in a passage from Story, *Commentarials On The Constitution*, 4th Ed., whose interpretation of the welfare clause this Court approved in *United States* v. *Butler, supra*. He recognized the requirement that appropriations must be for national welfare and said in Sec. 991:

> "In regard to the practice of the government, it has been entirely in conformity to the principles here laid down * * *. In some cases, not silently, but upon discussion, Congress has gone to the length of making appropriations to aid destitute areas and *cities laboring under severe calamities* * * *." (Italics supplied.)[36]

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[36] Attention should be called to evils—national in importance—which the sponsors of legislation similar to that finally enacted hoped to avoid:

> "These 5,000,000 are for the most part small farmers, each having his all invested in his farm, which is also his home, each struggling under a load of debt and taxes, fighting for life, health and home.
>
> "Statistics, collected and compiled from official sources within the present year, show that several thousands of farmers have been sold out for drainage taxes while other thousands are facing the same fate. Dispossessed, these farmers are and will be forced into the ranks of the unemployed. To enact this bill into law not only would be to give much needed and substantial relief to worthy farmers engaged in the fundamental industry of agriculture, but also would be to prevent in a considerable measure further increase in the number of unemployed." Senate Report No. 769, 71st Congress, 2d Session, p. 4.

C.

State Rights Have Not Been Invaded.

From the foregoing it appears that petitioners' contention of a violation of the Tenth Amendment is without substance. Specifically, we have endeavored to demonstrate that the statute under consideration and the loan authorization to Cameron County Water Improvement District fall within proper and traditional Federal powers, and that the terms and conditions imposed by the statute and by the loan authorization are not only incidental in purpose but essential to the proper exercise of these Federal powers. That the Tenth Amendment does not forbid a proper exercise of Federal powers was recently reaffirmed by this Court, in regard to the property clause of Article IV of the Constitution. It was held in *Ashwander* v. *Tennessee Valley Authority*, Nos. 403-404, October Term, 1935:

> "To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. And the Ninth Amendment (which petitioner also invoked) in insuring the maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the Federal government. The question is as to the scope of the grant and whether there are inherent limitations which render invalid the disposition of the property with which we are now concerned."

United States v. *Butler*, *supra*, is therefore not in point because as there stated:

> "* * * contracts for the reduction of acreage and the control of production are outside the range of that [Federal] power."

Furthermore, the statute under consideration is merely the offer of a privilege, which the Federal government may

properly extend. The statute provides that loans "shall be made for the purpose of *enabling* a borrower to reduce and refinance its outstanding indebtedness * * *."[37] Conditions of the loan, as discussed above, are frequently limited, when mentioned in the statute, by such phrases as "insofar as it [the borrower] may lawfully do so." There is no compulsion in law or fact upon a prospective borrower to apply to the R. F. C. Nor is there any compulsion upon the creditors of prospective borrowers. Under the law the R. F. C. was merely designated to supply funds upon proper terms to agricultural improvement districts which have determined independently that such funds will enable them more readily to refinance outstanding indebtedness, whether by voluntary agreement between creditors and the district or under existing provisions of law governing readjustments of such districts.

The mere extension of a privilege does not invade the rights of States. See *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23:

> "But the appellant, in the enjoyment of the *privilege* [conferred by the Federal government], is engaged in its own behalf, not the government's, in the conduct of a private business for profit." (Italics supplied.)

In *Massachusetts* v. *Mellon*, 262 U. S. 447, the link between the exercise of Federal powers and the conditions imposed to the grant of funds was not as clear or as direct as here. The controversy involved annual appropriations to states which would accept certain conditions designed to reduce maternal and infant mortality and to protect the health of mothers and infants. This Court said (p. 482):

> "What, then, is the nature of the right of the State here asserted, and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the

[37] Italics added.

powers granted to Congress by the Constitution, and within the field of local powers exclusively reserved to the States. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the States to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several States; and that there is imposed upon the States an illegal and unconstitutional option either to yield to the Federal Government a part of their reserved rights, or lose their share of the moneys appropriated. But what burden is imposed upon the States, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."

Finally, nothing in *Hopkins' Federal Savings and Loan Association* v. *Cleary,* Nos. 55-57, October Term, 1935, suggests a different result. In contrast to the "protest of Wisconsin" emphasized in that case we have here the following Act of the Texas Legislature:

> "Water Improvement Districts may borrow money from the Reconstruction Finance Corporation created by the laws enacted by the Congress of the United States for any purpose incident to its powers and functions and any purpose provided by law, and may evidence such debts by contract, agreements, notes, bonds or warrants payable within any term of years not to exceed forty years, and to bear interest at not to exceed the rate of six per centum per annum." (Acts of 1933, ch. 131, Sec. 5.)

The statute which is assailed as invading the rights of States is one designed to further traditional Federal pur-

poses. It is one whose provisions have expressly been approved by the legislature of the State whose sovereign rights are said to have been invaded. It is, in our opinion, abundantly plain that the Tenth Amendment can have no application.

CONCLUSION.

It is submitted that this is not an appropriate case for determining the important constitutional questions which the petitioners endeavor to raise and that the case should be remanded without consideration of the constitutional questions raised. If this Court should decide to hear the case on the merits, it is further submitted that the activities of the R. F. C., referred to by the petitioners, are not a proper subject for consideration at this time and that, in any event, they are a traditional and valid exercise of Federal power.

Respectfully submitted,

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April, 1936.

APPENDIX

Chapter 107 1935 Laws of the State of Texas

AN ACT authorizing municipalities, political subdivisions and taxing districts to proceed under the provisions of Federal Bankruptcy Laws enacted for the relief of such municipalities, political subdivisions and taxing districts; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That all municipalities, political subdivisions and taxing districts in this State which have power to incur indebtedness, either through action of their own governing bodies or through action of the governing bodies of counties or cities in which such political subdivisions or taxing districts are included, are hereby authorized to proceed under all laws enacted by the Congress of the United States under the Federal Bankruptcy powers, which laws have for their object the relief of municipal indebtedness, including H. R. 5950 of the Seventy-third Congress, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and acts amendatory thereof and supplementary thereto," approved May 24, 1934, and the officials and governing bodies of such municipalities, political subdivisions and taxing districts are authorized to adopt all proceedings and to do any and all acts necessary or convenient to fully avail such municipalities, political subdivisions and taxing districts of the provisions of such Acts of Congress.

SEC. 2. The public importance of this measure and the necessity for its enactment to relieve the acute financial embarrassment and to preserve the faith and credit of many municipalities, political subdivisions and taxing districts in this State, create and emergency and an imperative public necessity requiring the suspension of the Constitution

Rule requiring bills to be read on three separate days in each House, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Emergency Farm Mortgage Act, as Amended

PART 4—REFINANCING OF AGRICULTURAL IMPROVEMENT DISTRICT INDEBTEDNESS FOR THE BENEFIT OF FARMERS

LOANS BY RECONSTRUCTION FINANCE CORPORATION

SEC. 36. The Reconstruction Finance Corporation is authorized and empowered to make loans as hereinafter provided, in an aggregate amount not exceeding $125,000,000, to or for the benefit of drainage districts, levee districts, levee and drainage districts, irrigation districts, and similar districts, mutual nonprofit companies and incorporated water users' associations duly organized under the laws of any State, and to or for the benefit of political subdivisions of States, which prior to the date of enactment of this Act have completed projects devoted chiefly to the improvement of lands for agricultural purposes. Such loans shall be made for the purpose of enabling any such district, political subdivision, company, or association (hereafter referred to as the "borrower") to reduce and refinance its outstanding indebtedness incurred in connection with any such projects; or, whether or not it has any such indebtedness, to purchase or otherwise acquire in connection with such project storage reservoirs or dams or sites therefor, or additional water rights, or canals, ditches, or rights-of-way for the conduct of water, or other works or appurtenances necessary for the delivery of water, provided such purchase or acquisition is not intended to bring additional lands into production. Such loans shall be subject to the same terms and conditions as loans made under section 5 of the Reconstruction Finance Corporation Act[illegible]s

amended; except that (1) the term of any such loan shall not exceed forty years; (2) each such loan shall be secured by bonds, notes, or other obligations which are a lien on the real property within the project or on the assessments, taxes, or other charges imposed by the borrower pursuant to State law, or by such other collateral as may be acceptable to the Corporation; (3) the borrower shall agree not to issue during the term of the loan any other bonds so secured except with the consent of the Corporation; (4) the borrower shall agree, insofar as it may lawfully do so, that so long as any part of such loans shall remain unpaid the borrower will in each year apply to the repayment of such loan or to the purchase or redemption of the obligations issued to evidence such loan, an amount equal to the amount by which the assessments, taxes, and other charges collected by it exceed (a) the cost of operation and maintenance of the project, (b) the debt charges on its outstanding obligations, and (c) provision for such reasonable reserves as may be approved by the Corporation; and (5) in the case of a loan to reduce or refinance its outstanding indebtedness, the borrower shall agree, to the satisfaction of the Corporation, to reduce, insofar as it lawfully may, the annual taxes, assessments, and other charges imposed by it for or on account of the project by an amount proportional to the reduction in the corresponding annual requirements for principal and interest of its outstanding indebtedness by reason of the operation of this section. No loan shall be made under this section until the Reconstruction Finance Corporation (A) has caused an appraisal to be made of the property securing and/or underlying the outstanding bonds of the applicant, (B) has determined that the project of the applicant is economically sound, and (C) in the case of a loan to reduce or refinance the outstanding indebtedness of an applicant, has been satisfied that an agreement has been entered into between the applicant and hold-

ers of its outstanding bonds or other obligations under which the applicant will be able to purchase or refund all or a major portion of such bonds or other obligations at a price determined by the Corporation to be reasonable after taking into consideration the average market price of such bonds over the six months' period ending March 1, 1933, and under which a substantial reduction will be brought about in the amount of the outstanding indebtedness of the applicant.

When any loan is authorized pursuant to the provisions of this section and it shall then or thereafter appear that repairs and necessary extensions or improvements to the project of such district, political subdivision, company, or association are necessary or desirable for the proper functioning of its project or for the further assurance of its ability to repay such loans, and if it shall also appear that such repairs and necessary extensions or improvements are not designed to bring new lands into production, the Corporation, within the limitation as to total amount provided in this section, may make an additional loan or loans to such district, political subdivision, company, or association for such purpose or purposes. When application therefor shall have been made by any such district, political subdivision, company, or association any loan authorized by this section may be made either to such district, political subdivision, company, or association or to the holders or representatives of the holders of their existing indebtedness, and such loans may be made upon promissory notes collateraled by the obligations of such district, political subdivision, company, or association or through the purchase of securities issued or to be issued by such district, political subdivision, company, or association.